

Temporary Professional, Managerial, and Skilled Foreign Workers: Legislation in the 113th Congress

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Summary

The admission of professional, managerial, and skilled foreign workers raises a complex set of policy issues as the United States competes internationally for the most talented workers in the world, without adversely affecting U.S. workers and U.S. students entering the labor market. Legislative proposals that Congress has considered include streamlining procedures that govern the admission of professional, managerial, and skilled foreign workers; increasing the number of temporary professional, managerial, and skilled foreign workers admitted each year; requiring employers of professional, managerial, and skilled foreign workers to make efforts to recruit U.S. workers and offer wages and benefits that are comparable to similarly employed U.S. workers; extending labor protections and worker rights to professional, managerial, and skilled foreign workers to prevent abuse or exploitation of the worker; enabling professional, managerial, and skilled foreign workers to have “visa portability” so they can change jobs; and allowing professional, managerial, and skilled foreign workers to have “dual intent”; that is, to apply for lawful permanent resident (LPR) status while seeking or renewing temporary visas.

Adding to the complexity of the debate is the variety of temporary visa categories that enable employment-based temporary admissions for highly skilled foreign workers. They perform work that ranges from skilled labor to management and professional positions to jobs requiring extraordinary ability in the sciences, arts, education, business, or athletics. These visa categories are commonly referred to by the letter and numeral that denote their subsection in the Immigration and Nationality Act (INA).

Congress has focused on two visa categories in particular: H-1B visas for professional specialty workers, and L visas for intra-company transferees. These two nonimmigrant visas epitomize the tensions between the global competition for talent and potential adverse effects on the U.S. workforce. The United States struggles to support the recruitment of highly skilled professionals on H-1B visas and L visas without displacing U.S. workers or putting downward pressures on the wages and working conditions of U.S. workers and U.S. students entering the labor market. Achieving this end through a process that both meets the expeditious needs of U.S. business and preserves employment opportunities for U.S. workers is a challenge, and there are critics of the current H-1B and L policies on each side of the issue. Congress is also weighing reforms of other professional and outstanding worker visas as well as treaty-specific visas.

The 113th Congress has acted on legislation that would make extensive revisions to nonimmigrant categories for professional specialty workers (H-1B visas), intra-company transferees (L visas), and other skilled temporary workers. The Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744), as passed by the Senate, and the Supplying Knowledge-based Immigrants and Lifting Levels of STEM Visas Act (SKILLS Visa Act, H.R. 2131), as ordered reported by the House Committee on the Judiciary, would substantially revise these visa categories. Both bills have provisions aimed at streamlining procedures, strengthening enforcement, and expanding admissions.

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Legislation aimed at revising the law governing the admission of professional, managerial, and skilled foreign workers to the United States received attention in both chambers of the 113th Congress. This workforce is seen by many as a catalyst of U.S. global economic competitiveness and is likewise considered a key element of the legislative options aimed at stimulating economic growth. The challenge central to the policy debate is facilitating the migration of professional, managerial, and skilled foreign workers without adversely affecting U.S. workers and U.S. students entering the labor market.

This report provides legislative analyses of the Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744), as passed by the Senate, and the Supplying Knowledge-based Immigrants and Lifting Levels of STEM Visas Act (SKILLS Visa Act, H.R. 2131), as ordered reported by the House Committee on the Judiciary. Both bills would substantially revise the law governing the admission of professional, managerial, and skilled foreign workers to the United States.

The companion report, CRS Report R43735, *Temporary Professional, Managerial, and Skilled Foreign Workers: Policy and Trends*, by Ruth Ellen Wasem, as its name suggests, analyzes the current policy and statistical trends.

Background

Currently, there are 24 major nonimmigrant (i.e., aliens who the United States admits on a temporary basis) visa categories, and over 70 specific types of nonimmigrant visas issued. These visa categories are commonly referred to by the letter and numeral that denote their subsection in the Immigration and Nationality Act (INA).¹ Several visa categories are designated for employment-based temporary admission. A variety of temporary visas—by their intrinsic nature—allow foreign nationals to be employed in the United States.

Over the past two decades, the number of visas issued for temporary employment-based admission has more than doubled from just over 400,000 in FY1994 to over 1 million in FY2013. The Department of Homeland Security Office of Immigration Statistics estimated that there were approximately 1.1 million temporary workers and long-term exchange residents living in the United States in January 2012.² While the data include some unskilled and low-skilled workers as well as accompanying family members, the visas for managerial, skilled, and professional workers dominate the trends.³

Overarching Policy Options

The admission of professional, managerial, and skilled foreign workers raises a series of policy options as the United States competes internationally for the most talented workers in the world without putting downward pressures on the wages and working conditions of U.S. workers and U.S. students entering the labor market. Adding to the complexity of the debate is the variety of temporary visa categories that enable employment-based temporary admissions for highly skilled

¹ For a fuller discussion and analysis, see CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Ruth Ellen Wasem.

² Bryan Baker, *Estimates of the Size and Characteristics of the Resident Nonimmigrant Population in the United States: January 2012*, U.S. Department of Homeland Security Office of Immigration Statistics, Population Estimates, February 2014.

³ See CRS Report R43735, *Temporary Professional, Managerial, and Skilled Foreign Workers: Policy and Trends*, by Ruth Ellen Wasem.

foreign workers. They perform work that ranges from skilled labor to management and professional positions as well as jobs requiring extraordinary ability in the sciences, arts, education, business, or athletics. Congress has considered several overarching legislative options to reform the system of admitting highly skilled foreign workers, which include the following:

- streamlining procedures that govern the admission of professional, managerial, and skilled foreign workers so that the rules are less time consuming and burdensome for employers;
- increasing the number of temporary professional, managerial, and skilled foreign workers admitted each year;
- requiring employers of professional, managerial, and skilled foreign workers to meet labor markets tests, such as making efforts to recruit U.S. workers and offering wages and benefits that are comparable to similarly employed U.S. workers;
- extending labor protections and worker rights to professional, managerial, and skilled foreign workers to prevent abuse or exploitation of the worker;
- enabling professional, managerial, and skilled foreign workers to have “visa portability” so they can change jobs; and
- permitting professional, managerial, and skilled foreign workers to have “dual intent”; that is, to apply for lawful permanent resident (LPR) status⁴ while seeking or renewing temporary visas.

In addition to these issues that cross-cut the various temporary employment-based visas, Congress has focused in particular on two visa categories: H-1B visas for professional specialty workers, and L visas for intra-company transferees. These two nonimmigrant visas epitomize the tensions between the global competition for talent and potential adverse effects on the U.S. workforce.

Legislation in the 113th Congress

The 113th Congress has considered legislation that would make extensive revisions to nonimmigrant categories for professional specialty workers (H-1B visas), intra-company transferees (L visas), and other skilled temporary workers; and two bills have received action. They are the Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744) as passed by the Senate, and the Supplying Knowledge-based Immigrants and Lifting Levels of STEM Visas Act (SKILLS Visa Act; H.R. 2131), as ordered reported by the House Committee on the Judiciary. Both bills would substantially revise these visa categories, with provisions largely aimed at streamlining procedures, strengthening enforcement, and expanding admissions.

Proposed Reforms of the H-1B Visa

The major nonimmigrant category for temporary professional workers is the H-1B visa. To obtain an H-1B visa, the foreign national must work in a “specialty occupation.”⁵ Current law generally

⁴ A LPR is any person not a citizen of the United States who is residing in the United States under legally recognized and lawfully recorded permanent residence as an immigrant under the Immigration and Nationality Act. See CRS Report R42866, *Permanent Legal Immigration to the United States: Policy Overview*, by Ruth Ellen Wasem.

⁵ The regulations define a “specialty occupation” as requiring theoretical and practical application of a body of highly specialized knowledge in a field of human endeavor including, but not limited to, architecture, engineering,

limits annual H-1B admissions to 65,000, but most H-1B workers are exempted from the limits because they are returning workers or they work for universities and nonprofit research facilities that are exempt from the cap.⁶ In FY2012,⁷ the U.S. Citizenship and Immigration Services (USCIS) approved 257,538 H-1B professional specialty worker petitions, an increase from 192,990 in FY2010 (during the recession). In recent years, applications for new H-1B workers have routinely exceeded the numerical limits—in some years exceeding limits during the first week or even on the first day that applications are received.⁸

Provisions Aimed at H-1B Recruitment

S. 744 would seek to address perceived H-1B shortages by replacing the 65,000 per year cap on new H-1B admissions with a flexible cap that would range from a floor of 115,000 to a ceiling of 180,000 annually, with a “market-based” mechanism to increase or decrease the cap based on demand during the previous year (i.e., whether and how quickly the previous year’s limit was reached).⁹ Up to 25,000 STEM advanced degree graduates would be exempted from the cap.¹⁰ Spouses of H-1B workers would be permitted to work, thereby eliminating a potential barrier to H-1B recruitment.¹¹ The bill would ease the renewal of H-1B by limiting the review of such renewals to material errors, substantive changes, and newly discovered information.¹² In addition, H-1B workers would have a 60-day grace period after loss of a job to seek additional employment without losing their visa status.¹³ S. 744 would also streamline the adjustment of status for certain aliens with long-standing employment-based petitions for such adjustment,¹⁴ a provision aimed at addressing the backlog of H-1B workers with pending legal permanent resident (LPR) petitions.¹⁵

H.R. 2131 would increase the annual cap on H-1B workers from 65,000 to 155,000 and replace the current higher education degree exemption of 20,000 with an exemption for up to 40,000 foreign nationals who have STEM master’s or doctorate degrees. It would also permit the spouses

mathematics, physical sciences, social sciences, medicine and health, education, law, accounting, business specialties, theology, and the arts, and requiring the attainment of a bachelor’s degree or its equivalent as a minimum. 8 C.F.R. §214.2(h)(4). Law and regulations also specify that fashion models deemed “prominent” may enter on H-1B visas.

⁶ For more on H-1B admissions, see CRS Report R42530, *Immigration of Foreign Nationals with Science, Technology, Engineering, and Mathematics (STEM) Degrees*, by Ruth Ellen Wasem.

⁷ FY2012 is the most recent year for which USCIS has published the annual detailed data on H-1B admissions required by the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), P.L. 105-277, div. C, IV §416(c)(2), 112 Stat. 2681.

⁸ For FY2015, USCIS began accepting H-1B petitions on April 1, 2014. On April 7, 2014, USCIS announced that it had “received a sufficient number of H-1B petitions to reach the statutory cap for fiscal year (FY) 2015. USCIS has also received more than the limit of 20,000 H-1B petitions filed under the U. S. advanced degree exemption.” U.S. Citizenship and Immigration Services, “USCIS Reaches FY 2015 H-1B Cap,” press release, April 7, 2014, <http://www.uscis.gov/news/uscis-reaches-fy-2015-h-1b-cap>.

⁹ S. 744 §4101(a).

¹⁰ S. 744 §4101(b).

¹¹ S. 744 §4102.

¹² S. 744 §4103(a).

¹³ S. 744 §4103(b).

¹⁴ Adjustment of status is an immigration term that describes the legal process that a temporary alien resident of the United States goes through to become a lawful permanent resident (LPR). An LPR is any person not a citizen of the United States who is residing in the United States under legally recognized and lawfully recorded permanent residence under the INA.

¹⁵ S. 744 §4237. For more on these backlogs, see CRS Report R42048, *Numerical Limits on Employment-Based Immigration: Analysis of the Per-Country Ceilings*, by Ruth Ellen Wasem.

of H-1B workers to seek employment.¹⁶ The Department of Homeland Security (DHS) would be required to develop a streamlined pre-certification process for employers who file multiple petitions.¹⁷

Provisions Aimed at Protecting Workers

In addition to these concerns about whether employers have adequate access to H-1B workers, some Members of Congress have raised questions about whether H-1B workers may have an adverse effect on U.S. workers and whether H-1B workers are being treated legally under the terms of their employment. Most notable are concerns about H-1B workers displacing U.S. workers in certain occupations and the use of H-1B workers by companies that are out-sourcing jobs overseas. Some also express the viewpoint that the availability of H-1B workers may possibly place downward pressure on certain skilled U.S. workers' wages and/or discourage U.S. workers from entering STEM fields in which H-1B workers are well represented.¹⁸

Current law requires prospective employers of H-1B workers to submit a labor attestation to the Secretary of Labor to bring in foreign workers. The H-1B labor attestation, a three-page application form, is a statement of intent rather than a documentation of actions taken. In the labor attestation for an H-1B worker, the employer must attest that the firm will pay the nonimmigrant the greater of the actual wages paid to other employees in the same job or the prevailing wages for that occupation; the firm will provide working conditions for the nonimmigrant that do not cause the working conditions of the other employees to be adversely affected; and there is no applicable strike or lockout. The firm must provide a copy of the labor attestation to representatives of the bargaining unit or—if there is no bargaining representative—must post the labor attestation in conspicuous locations at the work site.¹⁹

S. 744 would seek to protect U.S. workers by modifying H-1B application requirements for investigating H-1B complaints. The bill would amend the employer H-1B application process to revise wage determination requirements based on Department of Labor (DOL) surveys,²⁰ and would require employers to advertise for U.S. workers on a DOL website.²¹ Section 4213 would impose additional restrictions on how employers advertise for H-1B positions, and would impose limits on the total number of H-1B and L workers certain employers can hire.²² S. 744 would

¹⁶ H.R. 2131 §201(a) and (b).

¹⁷ H.R. 2131 §312.

¹⁸ Richard Freeman, "The Market for Scientists and Engineers," *NBER Reporter*, no. 3 (Summer 2007); Rudy M. Baum, "Unemployment Data Worst In 40 Years," *Chemical and Engineering News*, March 21, 2012; U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Immigration, Refugees and Border Security, *The Economic Imperative for Enacting Immigration Reform*, answers to questions for the record, witness Professor Ron Hira, 112th Cong., 1st sess., July 26, 2011; U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, *H-1B Visas: Designing a Program To Meet the Needs of the U.S. Economy and U.S. Workers*, testimony of Professor Ron Hira, 112th Cong., 1st sess., March 31, 2011; and, U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, *STEM the Tide: Should America Try to Prevent an Exodus of Foreign Graduates of U.S. Universities with Advanced Science Degrees*, testimony of Dr. B. Lindsey Lowell, 112th Cong., 1st sess., October 5, 2011.

¹⁹ INA §212(n); 8 C.F.R. §214.2(h)(4). For a further discussion of labor attestations, see CRS Report RL33977, *Immigration of Foreign Workers: Labor Market Tests and Protections*, by Ruth Ellen Wasem; and CRS Report R43223, *The Framework for Foreign Workers' Labor Protections Under Federal Law*, by Margaret Mikyung Lee and Jon O. Shimabukuro.

²⁰ S. 744 §4211(a).

²¹ S. 744 §4211(b) and §4231.

²² S. 744 §4213.

establish a new fee of \$1,250–\$2,500 for H-1B (and L) visas that would be aimed at providing a disincentive for employers' undue reliance on these visas.²³

Provisions Aimed at H-1B Dependent Employers

The INA requires that employers defined as H-1B dependent (generally firms with at least 15% of the workforce who are H-1B workers) meet additional labor market tests.²⁴ These H-1B dependent employers must also attest that they tried to recruit U.S. workers and that they have not displaced U.S. workers in similar occupations within 90 days prior to or after the hiring of H-1B workers. Additionally, the H-1B dependent employers must offer the H-1B workers compensation packages (not just wages) that are comparable to U.S. workers.²⁵ As passed by the Senate, the Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744) would increase the numerical limits on H-1B workers admitted each year, revise the requirements on businesses that employ H-1B workers, and impose additional provisions aimed at fraud and abuse.²⁶ These provisions are discussed below by purpose of the revision.

Subtitle B of Title IV would establish a new class of H-1B dependent employers: H-1B skilled-worker dependent employers, defined as a function of the proportion of an employer's workforce that consists of H-1B workers in highly skilled occupations.²⁷ The bill would retain and revise the broader class of H-1B dependent employers defined in current law. Notably, H-1B workers for whom an employer petitions to become LPRs would be considered "intending immigrants" under S. 744 and would not count in calculations of whether their employers were H-1B dependent.

New provisions aimed at preventing employers from hiring H-1B workers intentionally to displace U.S. workers would be established, with different requirements for H-1B dependent employers, H-1B skilled-worker dependent employers, and all other H-1B employers.²⁸ Employers would be required to make good faith efforts to recruit U.S. workers prior to hiring H-1B workers, and those employers deemed H-1B skilled worker dependent would be required to offer a position to any equally or better qualified U.S. worker applying for a job that would otherwise be filled by an H-1B worker.²⁹ Certain H-1B dependent employers would not be permitted to outsource H-1B workers, and employers who outsource H-1Bs would pay a \$500 fee.³⁰

Provisions Aimed at H-1B Visa Fraud and Abuse

Over the years, the U.S. Government Accountability Office (GAO) has issued reports that recommended more controls to protect workers, prevent abuses, and streamline services in the

²³ S. 744 §4105.

²⁴ The American Competitiveness and Workforce Improvement Act (ACWIA) (Title IV of P.L. 105-277) defined H-1B dependent employers as follows: firms having 25 or less employees, of whom at least 8 are H-1Bs; firms having 26-50 employees of whom at least 13 are H-1Bs; firms having at least 51 employees, 15% of whom are H-1Bs; excludes those earning at least \$60,000 or having masters degrees. CRS Report 98-531, *Immigration: Nonimmigrant H-1B Specialty Worker Issues and Legislation*, by Ruth Ellen Wasem (archived).

²⁵ INA §212(n).

²⁶ U.S. Congress, Senate Committee on the Judiciary, *Border Security, Economic Opportunity and Immigration Modernization Act (S. 744)*, 113th Cong., 1st sess., June 7, 2013, 113-40.

²⁷ S. 744 §4211(e).

²⁸ S. 744 §4211(c).

²⁹ S. 744 §4211(c).

³⁰ S. 744 §4211(d).

issuing of H-1B visas. GAO has observed that DOL has limited authority to question information on the labor attestation form and initiate enforcement activities.³¹ In 2011, GAO identified several weaknesses in the H-1B program's ability to protect workers: (1) oversight that is fragmented between four agencies and restricted by law; (2) lack of legal authority to hold employers accountable to program requirements when they obtain H-1B workers through a staffing company; and (3) expansions that have increased the pool of H-1B workers beyond the cap and lowered the bar for eligibility.³²

A 2008 internal Department of Homeland Security (DHS) investigation of H-1B visa adjudications found a 13.4% fraud rate as well as a 7.3% technical violation rate. Violations reportedly ranged from document fraud to deliberate misstatements regarding job locations, wages paid, and duties performed. The investigation also discovered that some petitioning employers shifted the burden of paying various filing fees to foreign workers. A 2010 DHS investigation found a 14% "not verified" rate, which U.S. Citizenship and Immigration Services (USCIS)³³ officials cited to suggest a reduced level of fraud in the H-1B program.³⁴ It was unclear, however, how the 14% "not verified" rate compared with 13.4% fraud rate and the 7.3% technical violation rate.

To address these issues, S. 744 would permit DOL to review an H-1B attestation for evidence of fraud and to investigate and adjudicate any evidence of fraud identified.³⁵ Subtitle B of Title IV of S. 744 also would broaden DOL's authority to investigate alleged employer violations, and would require DOL to conduct annual compliance audits of certain employers.³⁶ Employers who willfully violate the terms of their labor attestations would be subject to increased fines and would be liable for the lost wages and benefits of employees harmed by such violations.³⁷ Employers also would be prohibited from failing to offer H-1Bs insurance, pension plans, and bonuses offered to U.S. workers, and from penalizing H-1B workers for terminating employment before a previously agreed date.³⁸ The bill would also establish new information-sharing requirements between USCIS and DOL when there is evidence of H-1B employer noncompliance,³⁹ and new reporting requirements to Congress regarding information about the number and characteristics of H-1B (and L) workers and employers.⁴⁰

³¹ U.S. General Accounting Office, *H-1B Foreign Workers: Better Controls Needed to Help Employers and Protect Workers*, GAO/HEHS-00-157, September 2000; U.S. General Accounting Office, *H-1B Foreign Workers: Better Tracking Needed to Help Determine H-1B Program's Effects on U.S. Workforce*, GAO-03-883, September 2003; and, U.S. Government Accountability Office, *H-1B Visa Program: Reforms are Needed to Minimize the Risks and Costs of Current Program*, GAO-11-26, January 14, 2011.

³² U.S. Government Accountability Office, *H-1B Visa Program: Multifaceted Challenges Warrant Re-examination of Key Provisions*, GAO-11-505T, March 31, 2011, p. 2, <http://www.gao.gov/assets/90/82421.pdf>.

³³ U.S. Citizenship and Immigration Services (USCIS) is the government agency in the Department of Homeland Security (DHS) that oversees lawful immigration to the United States.

³⁴ Office of Fraud Detection and National Security, *H-1B Benefit Fraud and Compliance Assessment*, U.S. Citizenship and Immigration Services, September 2008; and, U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, *H-1B Visas: Designing a Program to Meet the Needs of the U.S. Economy and U.S. Workers*, testimony of Donald Neufeld, USCIS Associate Director, 112th Cong., 1st sess., March 31, 2011.

³⁵ S. 744 §4214.

³⁶ S. 744 §§4221 and 4223.

³⁷ S. 744 §4222.

³⁸ S. 744 §4222.

³⁹ S. 744 §4224.

⁴⁰ S. 744 §4225.

In addition, the subtitle would require the U.S. Department of State⁴¹ and DHS to provide H-1B (and L) workers with information regarding their rights and employer obligations.⁴² Certain H-1B dependent employers would be required to pay an additional \$5,000–\$10,000 in filing fees.⁴³

H.R. 2131 would direct the Department of State to verify the authenticity of foreign educational degrees and would authorize a fee on employers to cover the costs of verifying the credentials of the foreign degree. The bill also would add requirements for DHS to verify that the employer is either a bona fide business with “aggregate gross assets with a value of not less than \$50,000,” an institution of higher education (as defined in §101(a) of the Higher Education Act of 1965), or a governmental or nonprofit entity. Furthermore, H.R. 2131 would authorize the Secretary of Labor to issue subpoenas to employers of H-1B (and E-3) workers.⁴⁴

Proposed Reforms of the L Visa

The L intra-company transferee visa was established for companies that have offices abroad to transfer key personnel freely within the organization. It is considered a visa category essential to retaining and expanding international businesses in the United States. Some, however, have raised concerns that intra-company transferees on the L visa may displace U.S. workers who had been employed in those positions for these firms in the United States. Others express concern that the L visa has become a substitute for the H-1B visa, noting that L employees are often comparable in skills and occupations to H-1B workers, yet lack the labor market protections the law sets for hiring H-1B workers. These concerns have been raised, in particular, with respect to certain outsourcing and information technology firms that employ L workers as subcontractors within the United States. A related concern is that an unchecked use of L visas will foster the transfer of STEM and other high-skilled professional jobs overseas.⁴⁵ After investigating the L visa, the Department of Homeland Security Inspector General offered this assessment: “That so many foreign workers seem to qualify as possessing specialized knowledge appears to have led to the displacement of American workers, and to what is sometimes called the ‘body shop’ problem.”⁴⁶

Under current law, the prospective L nonimmigrant must demonstrate that he or she meets the qualifications for the particular job as well as the visa category. The alien must have been employed by the firm for at least six months in the preceding three years in the capacity for which the transfer is sought. More precisely, the foreign national must be employed in an executive capacity, a managerial capacity, or have specialized knowledge of the firm’s product to be eligible for the L visa. The INA does not require firms who wish to bring L intracompany transfers into the United States to demonstrate that U.S. workers will not be adversely affected in order to obtain a visa for the transferring employee.

S. 744 would extend some of the same provisions that it would require for employers of H-1B workers to employers of L workers. It would impose limits on the total number of L workers

⁴¹ The Department of State’s Bureau of Consular Affairs is the agency responsible for issuing visas.

⁴² S. 744 §4232.

⁴³ S. 744 §4233.

⁴⁴ H.R. 2131 §201(c).

⁴⁵ For historical background, see CRS Report RL32030, *Immigration Policy for Intracompany Transfers (L Visa): Issues and Legislation*, by Ruth Ellen Wasem.

⁴⁶ Office of the Inspector General, *Review of Vulnerabilities and Potential Abuses of the L-1 Visa Program*, U.S. Department of Homeland Security, OIG-06-22, January 2006, p. 9, http://www.oig.dhs.gov/assets/Mgmt/OIG_06-22_Jan06.pdf.

certain employers can hire.⁴⁷ S. 744 would establish a new fee of \$1,250–\$2,500 for L visas that would be aimed at providing a disincentive for employers’ undue reliance on these visas.⁴⁸ It would also add new requirements for reporting to Congress regarding information about the number and characteristics of L workers and employers.⁴⁹ The Senate-passed bill would require DHS and DOS to provide L workers with information regarding their rights and employer obligations.⁵⁰

In addition, S. 744 would add prohibitions on the outsourcing and outplacement of L employees, including by charging a \$500 fee to be deposited in the proposed STEM Education and Training Account.⁵¹ Employers seeking to bring an L-visa worker to the United States to open a new office would face special application requirements.⁵² DHS would be required to work with DOS to verify the existence of multinational companies petitioning for the L workers.⁵³ Section 4304 would impose caps on the total proportion of certain employers’ workforces that may consist of L and H-1B workers, falling from an upper limit of 75% in FY2015 to an upper limit of 50% after FY2016.⁵⁴ Section 4305 would also impose additional fees of \$5,000–\$10,000 for certain H-1B/L-dependent employers beginning in FY2014.⁵⁵

With respect to compliance, S. 744 would authorize DHS to investigate and adjudicate alleged employer violations of L visa program requirements for up to 24 months after the alleged violation; and DOL would be required to conduct annual compliance audits of certain employers.⁵⁶ The subtitle also would impose civil monetary penalties and other remedies for violations, including debarment from L-worker petitions and liability for lost wages and benefits to employees harmed by violations.⁵⁷ In addition, Section 4308 would add whistleblower protections for L-workers. And DHS would be required to report on the L visa blanket petition process.⁵⁸

H.R. 2131 would add labor market tests to the L-1B visa for individuals with specialized knowledge who would be working in the United States for at least six months over a two-year period. In those cases, the employer would be required to pay either the actual wage paid to similarly employed workers or the prevailing wage (whichever is higher). In addition, the employer would be required to provide working conditions that would not adversely affect the working conditions of similarly employed workers.⁵⁹ DHS would be required to develop a streamlined pre-certification process for employers who file multiple petitions.⁶⁰

⁴⁷ S. 744 §4213.

⁴⁸ S. 744 §4105.

⁴⁹ S. 744 §4225.

⁵⁰ S. 744 §4232.

⁵¹ S. 744 §4301.

⁵² S. 744 §4302.

⁵³ S. 744 §4303.

⁵⁴ S. 744 §4304.

⁵⁵ S. 744 §4305.

⁵⁶ S. 744 §4306.

⁵⁷ S. 744 §4307.

⁵⁸ S. 744 §§4309 and 4311.

⁵⁹ H.R. 2131 §202.

⁶⁰ H.R. 2131 §302.

Provisions Expanding the E Treaty Visas

Foreign nationals who are treaty traders enter on E-1 visas, whereas those who are treaty investors use E-2 visas. An E-1 treaty trader visa allows a foreign national to enter the United States for the purpose of conducting “substantial trade” between the United States and the country of which the person is a citizen. An E-2 treaty investor can be any person who comes to the United States to develop and direct the operations of an enterprise in which he or she has invested, or is in the process of investing, a “substantial amount of capital.” Both these E-class visas require that a treaty exist between the United States and the principal foreign national’s country of citizenship.⁶¹ The E Treaty visas are especially attractive to global businesses and subsidiaries of international corporations. As a consequence, interest in expanding access to these visas has grown as more businesses seek access to U.S. markets.

S. 744 would amend the requirements for the E visa to allow E visas to be issued to citizens from countries where there is a bilateral investment treaty or a free trade agreement.⁶² The legislation would also expand the use of treaty professional workers and would lower the educational and training requirements for foreign nationals coming from specified countries.

The E-3 treaty professional worker visa is a temporary work visa limited to citizens of Australia. It is usually issued for two years at a time. Occupationally, it mirrors the H-1B visa in that the foreign worker on an E-3 visa must be employed in a specialty occupation.

S. 744 would amend the E-3 visa category so that nationals of Ireland would be eligible. The Irish national would not be required to be employed in a professional specialty, and could provide services as an employee, provided he/she has at least a high school education or, within five years, two years work experience in an occupation that requires two years of training or experience.⁶³ There would be a limit of 10,500 E-3 visas per year for Irish nationals.

H.R. 2131 would require employers of E-3 employees to pay the \$500 Fraud Detection and Prevention Fee currently required of employers of H-1B and L employees.⁶⁴ In addition, H.R. 2131 would authorize the Secretary of Labor to issue subpoenas to employers of E-3 workers to enhance investigation and enforcement efforts.⁶⁵

S. 744 also would create a new E-4 visa category that would be limited to 5,000 visas per year per country; only principal aliens would be counted against the cap. Additionally, the bill would create an E-5 visa category for South Korean workers in specialty occupations that would be limited to 5,000 visas annually. Employers seeking to hire E-4 or E-5 workers would have to file a labor attestation form with DOL.⁶⁶ A new E-6 nonimmigrant visa category also would be established for nationals of eligible sub-Saharan African countries⁶⁷ or beneficiary countries of

⁶¹ See CRS Report RL32030, *Immigration Policy for Intracompany Transfers (L Visa): Issues and Legislation*, by Ruth Ellen Wasem; and CRS Report RL33844, *Foreign Investor Visas: Policies and Issues*, by Alison Siskin.

⁶² Currently, E-1 and E-2 visas can only be issued to nationals from countries that have treaties of commerce and navigation. Free trade agreements are not considered treaties of commerce and navigation.

⁶³ S. 744 §4403.

⁶⁴ H.R. 2131 §208.

⁶⁵ H.R. 2131 §201(c).

⁶⁶ For more on labor attestation, see CRS Report RL33977, *Immigration of Foreign Workers: Labor Market Tests and Protections*, by Ruth Ellen Wasem; and CRS Report R43223, *The Framework for Foreign Workers’ Labor Protections Under Federal Law*, by Margaret Mikyung Lee and Jon O. Shimabukuro.

⁶⁷ These countries would be defined by §104 of the African Growth and Opportunity Act (19 U.S.C. §3703).

the Caribbean Basin Economic Recovery Act⁶⁸ who are coming to the United States to work, and have at least a high school education or, within the past five years, two years of work experience in an occupation that requires at least two years of training/experience. These visas would be limited to 10,500 per year.⁶⁹

Proposed Reforms of Other Professional and Outstanding Worker Visas

Provisions Revising the J Visas

The U.S. Department of State's Bureau of Educational and Cultural Affairs (BECA) is responsible for approving the J visa cultural exchange programs. Most foreign nationals on J-1 visas are permitted to work as part of their cultural exchange program participation. The J cultural exchange visas have expanded over time from visas issued for educational, research, or scholarship purposes to visas issued for programs engaged in more mundane tasks, such as child care, resort work, or camp counseling. Spouses and minor children of J-1 visaholders may accompany them on J-2 visas, but they are not permitted to work.

As the J visa has transformed from a predominately educational visa to a largely employment visa, a new set of concerns has arisen.⁷⁰ In 2011, about 400 temporary workers on J visas went on strike at the Hershey's Chocolate packing plant in Palmyra, PA, garnering national attention. The DOS Office of Inspector General made the following observation in 2012: "Public criticism of the Summer Work Travel (SWT) program is the most recent negative consequence of unfettered growth and weak regulation of privately funded exchanges. BECA should strictly limit SWT until it can provide proper oversight."⁷¹ The following year, however, another group of temporary workers on J visas employed by a MacDonald's franchise in Pennsylvania protested their working conditions.⁷² Efforts to address these matters have been met by those who maintain that it is inappropriate to treat cultural exchange programs "the same way as non-immigrant labor programs (like migrant farm workers, "Deadliest Catch" fishing boat crews and construction crews)," because they are public diplomacy programs.⁷³

The Senate approved a floor amendment to S. 744 that included provisions that would establish a new definition of foreign labor recruitment for use with the J visa, and would give the J visaholder as well as DOS the right to bring a civil action in federal court against a program sponsor, foreign entity, or an employer. The bill would also prohibit retaliation against a J visaholder complaining about program conditions, including housing and job placements, wages, hours, and general treatment, or for disclosing retaliation. DOS would be required to promulgate new regulations in consultation with DOL on various J-1 categories, to provide J visaholders with

⁶⁸ 19 U.S.C. §§2701 *et seq.*

⁶⁹ S. 744 §4402.

⁷⁰ Daniel Costa, *Guestworker Diplomacy: J Visas Receive Minimal Oversight Despite Significant Implications for the U.S. Labor Market*, Economic Policy Institute, Washington, DC, July 14, 2011, http://www.epi.org/publication/j_visas_minimal_oversight_despite_significant_implications_for_the_labor_ma/.

⁷¹ Office of Inspector General, *Inspection of the Bureau of Educational and Cultural Affairs*, U.S. Department of State, ISP-I-12-15, February 2012, <http://oig.state.gov/documents/organization/217892.pdf>.

⁷² Yuki Noguchi, "U.S. Probes Abuse Allegations under Worker Visa Program," *NPR—National Public Radio*, March 18, 2013.

⁷³ Michael J. Petrucelli, "Don't Devalue Exchange Programs in Immigration Reform," *Rollcall*, July 15, 2013.

additional disclosures on rights and protections under the INA, and to maintain a list of employers who have had substantiated complaints.⁷⁴

Also, the Senate approved a floor amendment to S. 744 that added language to impose a \$100 fee on designated program sponsors for each nonimmigrant entering on a J visa as part of a summer work/travel exchange.⁷⁵ The \$100 fee would be deposited in the proposed Comprehensive Immigration Reform Trust Fund and could not be charged to the nonimmigrant. The bill would also specify that summer work/travel exchange participants on J visas are eligible to be employed in seafood processing in Alaska. S. 744 would also make eligible for a J visa foreign nationals who are coming to the United States to perform specialized work that requires proficiency of languages spoken in countries with less than 5,000 LPR admissions in the previous year.⁷⁶

Provisions Making the “Conrad 30” Program Permanent

Currently, foreign medical graduates (FMGs) may enter the United States on J visas in order to receive graduate medical education and training. Such FMGs must return to their home countries after completing their education or training for at least two years before they can apply for certain other nonimmigrant visas or LPR status, unless they are granted a waiver of the foreign residency requirement. States are permitted to sponsor up to 30 waivers per state, per year on behalf of FMGs under a temporary program, colloquially known as the Conrad 30 Program because it was originally sponsored by former Senator Kent Conrad. The objective of the Conrad 30 Program is to encourage immigration of foreign physicians to medically underserved communities.

Both S. 744 and H.R. 2131 would make the Conrad 30 J waiver permanent and would allow the program to grow by up to five waivers per year, or be reduced (though never below 30), based on demand for the program.⁷⁷ The bills also include a number of provisions to regulate working conditions and add flexibility to the J visa program for such physicians.⁷⁸ S. 744 would make changes to facilitate physicians holding J or H-1B visas seeking to remain in the United States, including by allowing dual intent for J-1 foreign medical graduates,⁷⁹ making alien physicians who received a Conrad waiver or completed their two-year home residency requirement exempt from numerical limits if they adjust to LPR status,⁸⁰ and making the spouses and children of J-1s no longer subject to the two-year home residency requirement.⁸¹ The bill would also allow physicians in H-1B status and completing their medical training to automatically have such status extended.⁸²

⁷⁴ S. 744 §§3901-3911.

⁷⁵ The fee was \$500 in S. 744 as reported.

⁷⁶ S. 744 §§4407, 4408.

⁷⁷ S. 744 §2401.

⁷⁸ S. 744 §2403 and H.R. 2131 §108.

⁷⁹ S. 744 §2403(c).

⁸⁰ S. 744 §2307(b)(1).

⁸¹ S. 744 §2405(c).

⁸² S. 744 §2405(b). If the petition for extending H-1B status is eventually denied, the employment authorization would expire 30 days after the denial.

Provisions Giving Portability for O Outstanding Visas

Persons with extraordinary ability in the sciences, arts, education, business, or athletics are admitted on O visas,⁸³ whereas internationally recognized athletes or members of an internationally recognized entertainment group come on P visas. Generally, the O visa is reserved for the highest level of accomplishment and covers a fairly broad set of occupations and endeavors, including athletics and entertainers. The P visa has a somewhat lower standard of achievement than the O visa, and it is restricted to a narrower band of occupations and endeavors. The P visa is used by a foreign national who performs as an artist, athlete, or entertainer (individually or as part of a group or team) at an internationally recognized level of performance and who seeks to enter the United States temporarily and solely for the purpose of performing in that capacity. The law allows individual athletes to stay in intervals up to five years at a time, up to 10 years in total.

Both S. 744 and H.R. 2131 would add visa portability (i.e., the ability to change employers without reapplying for a new visa) for foreign nationals on O-1 visas. Both bills also would add flexibility to the requirements for being admitted on an O-1 visa based on achievement in motion picture or television production.⁸⁴ DHS would be required to develop a streamlined pre-certification process for employers who file multiple O or P petitions.⁸⁵

Provisions Adding Wage Requirements to TN Professional Visas

Temporary professional workers from Canada and Mexico may enter according to terms set by the North American Free Trade Agreement (NAFTA) on TN visas. In many ways, these visas are similar to H-1B visas because of the nature of the work performed as well as the education and skills required to obtain these visas.

H.R. 2131 would add labor market tests to the TN visas for Canadian and Mexican professional workers. In those cases, the employer would be required to pay either the actual wage paid to similarly employed workers or the prevailing wage (whichever is higher). In addition, the employer would be required to provide working conditions that would not adversely affect the working conditions of similarly employed workers. DOL would also have authority to investigate these elements.⁸⁶ The \$500 Fraud Detection and Prevention fee would also be required in the cases of TN visas as well as the E-3 visas.⁸⁷

Provisions Related to Employment of Foreign Students

Foreign students on F-1 visas are generally barred from off-campus employment. After completing their undergraduate or graduate studies, however, F-1 foreign students are permitted to participate in employment known as Optional Practical Training (OPT), which is temporary employment that is directly related to an F-1 student's major area of study.⁸⁸ Generally, an F-1 foreign student may work up to 12 months in OPT status. In 2008, DHS expanded the OPT work

⁸³ The O-1 visa is issued to the qualifying foreign national. The accompanying spouse and minor children are issued O-2 visas.

⁸⁴ S. 744 §4404 and H.R. 2131 §203.

⁸⁵ H.R. 3121 §312.

⁸⁶ H.R. 2131 §204.

⁸⁷ H.R. 2131 §208.

⁸⁸ Generally, foreign students on F visas are otherwise barred from off-campus employment.

period to 29 months for F-1 students in STEM fields. To qualify for the 17-month extension, F-1 students must have received STEM degrees included on the STEM Designated Degree Program List, be employed by employers enrolled in E-Verify,⁸⁹ and have received an initial grant of post-completion OPT related to such a degree (i.e., already approved for 12 months in OPT).⁹⁰

Much like the evolution of the J visa from cultural exchange to employment, concerns have arisen that the F-1 visa is transforming into an employment visa. Many observers point to difficulties in obtaining an H-1B visa and the backlogs in adjusting to lawful permanent residence as reasons that drive the relaxation of the work rules for F-1 students. GAO recently released a report noting the potential for fraud and abuse of the OPT status. GAO concluded that DHS' Immigration and Customs Enforcement was unable to "fully ensure foreign students working under optional practical training are maintaining their legal status in the United States."⁹¹

Aimed at easing the transition from international student to LPR, both S. 744, as passed by the Senate, and H.R. 2131, as ordered reported by the House Judiciary Committee, would make changes to the F visa category. S. 744 would allow aliens on F visas who are seeking bachelor's or graduate degrees, dual intent; thus, they could seek LPR status while maintaining F status. H.R. 2131 would allow dual intent only for aliens on F visas who are seeking bachelor's and graduate degrees in STEM fields. In other words, many F-1 students working with OPT would, if enacted, be able to apply for LPR status while engaged in OPT employment.

In addition, H.R. 2131 would require employers of OPT students to pay either the actual wage paid to similarly employed workers or the prevailing wage (whichever is higher). DOL would also have authority to investigate.⁹²

Concluding Comments

The likelihood of enacting legislation to revise laws on the migration of professional, managerial, and skilled foreign workers is linked to the competing approaches to immigration reform. Among those who support immigration reform, some favor a package of incremental reform bills and others support one comprehensive immigration reform (CIR) bill. While the Senate passed a bipartisan CIR bill (S. 744), the House Republican leadership had favored approaching the issues in discreet "chunks" as H.R. 2131 does.⁹³ At this point in time, there appears to be a consensus that action on either approach is unlikely.⁹⁴

⁸⁹ E-Verify is an electronic employment eligibility verification program that U.S. employers voluntarily use to confirm the new hires' employment authorization through Social Security Administration and, if necessary, DHS databases. CRS Report R40446, *Electronic Employment Eligibility Verification*, by Andorra Bruno.

⁹⁰ 8 C.F.R. 214.2(f)(10).

⁹¹ U.S. Government Accountability Office, *Student and Exchange Visitor Program: DHS Needs to Assess Risks and Strengthen Oversight of Foreign Students with Employment Authorization*, GAO-14-356, February 27, 2014, p. 18, <http://www.gao.gov/products/GAO-14-356>.

⁹² H.R. 2131 §206.

⁹³ Daniel Newhauser, "Boehner: Most Republicans Want to Deal With Immigration," *Roll Call*, May 12, 2014.

⁹⁴ David Nakamura and Ed O'Keefe, "Immigration reform effectively dead until after Obama leaves office, both sides say," *The Washington Post*, June 26, 2014; Lawrence Downes, "Immigration Reform is Dead," *The New York Times*, June 25, 2014; and, "The Immigration Reform Collapse: A bipartisan failure that will hurt the economy—and especially the GOP," *The Wall Street Journal*, July 2, 2014.

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